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STATE OF MICHIGAN

SUPREME COURT

PAUL DRESSEL and
THERESA DRESSEL,

Plaintiffs-Appellees,

v

AMERIBANK,

Defendant-Appellant.
/

Supreme Court Case No. 119959

Court of Appeals Case No. 222447

Kent County Circuit Court
Lower Court No. 98-013017-CP

BRIEF OF MICHIGAN MORTGAGE LENDERS ASSOCIATION AND MICHIGAN MORTGAGE BROKERS ASSOCIATION AMICI CURIAE, IN SUPPORT OF AMERIBANK

Submitted by:

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STATEMENT OF INTEREST

The Michigan Mortgage Lenders Association ("MMLA"), (formerly the Mortgage Bankers Association of Michigan), is a non-profit corporation, which since 1929 has served as the voice of the residential mortgage lending industry and its consumers in Michigan. Its 237 corporate members and 420 individual members represent every major residential mortgage lender in Michigan, including banks, mortgage companies and other financial institutions. Its members are pledged to providing "the highest standards of professional service" and promotion of "sound and ethical business practices."

The Michigan Mortgage Brokers Association (MMBA), a non-profit corporation, is a trade association representing the mortgage brokers in Michigan. Its 312 members include banks, mortgage companies and other finance organizations throughout Michigan. MMBA members likewise subscribe to a strict code of ethics. These 2 organizations together originate over 70% of the residential mortgage loans in Michigan.

The members of these two trade associations are responsible for making available the vast majority of the money utilized by residents of this state to purchase their homes. The members compete in a national secondary mortgage market for these funds which enable Michigan to have a very high percentage of home ownership. Many members of both the MMBA and the MMLA do business in multiple states.

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STATEMENT OF CASE

Ameribank makes residential mortgage loans. The residential mortgage loan department uses standard documents and fills out the forms using a computer software program that guides the employees on obtaining information. The employees are not permitted to change the standard terms of the documents. The blanks completed in the documents by the employees reflect the terms of the transaction, comply with government regulations and permit the sale of the mortgage loan in the secondary market. In connection with a mortgage loan to Paul and Theresa Dressel, Ameribank charged a document preparation fee of $400.00. No claim has been made that Ameribank ever represented that it was acting as a lawyer, gave legal advice or filled in blanks in any form improperly. The Dressels claim that by charging this fee, Ameribank engaged in the unauthorized practice of law. The trial court disagreed and granted summary disposition. The Court of Appeals overruled the trial court without specifically stating that filling in of blanks was the practice of law even if no legal advice was given and that the "pro se" exception to the unauthorized practice of law does not apply if a separate charge is made.

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ARGUMENT

THE BROAD AND REVOLUTIONARY IMPLICATIONS OF THE DECISION OF THE COURT OF APPEALS MAKE IMPERATIVE REVERSAL BY THIS COURT.

The vast majority of mortgage companies have been charging borrowers document preparation fees for decades. Congress recognized that borrowers were charged document preparation fees when, in 1968, it adopted the Federal Truth in Lending Act, 15 USC 1601 et seq., and excluded the document preparation fee from the calculation of the finance charge, see 15 USC 1605(e). Similarly, the United States Department of Housing and Urban Development recognized that borrowers were being charged document preparation fees when it prepared the HUD-1 Settlement Statement in the mid 1970's and included line 1105 for stating the document preparation fee.

Mortgage companies either prepare the documents on their own computer system or purchase the documents from a document preparation company. In either case, they pass the cost on to the borrower. Mortgage companies never contemplated that they were engaged in the practice of law.

The claim that what Ameribank's employees traditionally do in filling out the blanks in computerized loan closing forms, notes and mortgages and making a charge for such service constitutes the "unauthorized practice of law" was not initiated by the Attorney General on behalf of the people of Michigan, the State Bar, or any local bar association. It was asserted, rather, by plaintiffs and their energetic counsel in one of a number of class action lawsuits filed to recapture fees charged in originating the mortgage loan which loans plaintiffs voluntarily sought and obtained from Ameribank. What constitutes the "unauthorized practice of law" is not defined by statute but remains

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to be fashioned by the courts. The Court of Appeals in this case ventured into this traditionally troublesome area without the benefit of insight into modern residential lending practices. It simply reviewed and reversed the grant of defendant's motion for summary disposition, and largely ignored the careful opinion of the Circuit Court as well as the facts presented to that Court. Among other things, the Opinion of the Court of Appeals is silent as to the only factual affidavit filed in this matter, to-wit: The Affidavit of Lee Pankratz. It made no analysis of the functions performed by the Bank's employees but opined that they must be equated with bona fide legal services rendered to the public because mortgage loan customers were separately charged an itemized fee for "document preparation."

This Court has long recognized that under our system of jurisprudence the "practice of law" must necessarily change "with the ever changing business and social order." Grand Rapids Bar Association v. Denkema, 290 Mich 56, 64 (1939); State Bar of Michigan v Cramer, 399 Mich 116, 133 (1976). Over time, the complexities of our society and the speed at which commercial enterprise is carried on have transformed and relaxed the dogmas of an earlier day and a less urban milieu. Justice North prophetically spoke for himself in 1939 when he warned against "excessive zeal" in "protecting the legal fraternity in its exclusive right to practice law." Grand Rapids Bar Assoc v Denkema, 290 Mich 56, 70 (1939). His depression-spawned concern now seems historically quaint when stockbrokers advertise estate-planning services on television and the computer has frequently supplanted the personal counselor. Michigan is one of the most advanced and developed centers of commercial activity in the world and it "will not do", as this Court said in State Bar of Michigan v Cramer, 399

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Mich 116, 133 (1976), to expect a lawyer to "preside over every transaction where written legal forms must be selected and used."

The sole purpose of the "unauthorized practice of law" requirement, as the Court notes in Cramer, is "to protect the public". The Court of Appeals did not explain how the public is imperiled when a prospective mortgagor voluntarily seeks to finance the purchase of a home in an arm's length commercial transaction for which he expects to pay.[1] Nor did it explain why the cost of "document preparation" merits more malign attention and treatment than "administration costs" or "processing charges" or any other expenses, which a mortgagee might reasonably impose. The use of one label or another, and the itemization or combination of charges made by a willing lender to a willing borrower plainly cannot transform innocent commercial practice into an assault on lawful order. This Court has never embraced such talismanic jurisprudence.

The emphasis given by the Court of Appeals to the fact Ameribank disclosed that it was making a charge for document preparation transforms the "unauthorized practice" statute into an economic regulatory act limiting the charges which a lender may levy – a matter which the Michigan legislature did not deal with in the "practice of law" statute

[1] The United States Dept. of Housing and Urban Development booklet *Buying Your Own Home* (Washington, D.C.; United States Gov't. Printing Office, 1997) cited on page 1 of the Appeals Court Opinion is required by Federal law, the Real Estate Settlement Procedures Act ("RESPA"), to be given to every borrower at the time the loan application is completed. This book under Section I advises the borrower regarding "settlement" or "closing costs that"..."you have the opportunity to negotiate the terms, conditions and costs to your advantage. This booklet will highlight such opportunities. You will also need to shop carefully to get the best value for your money." Further, in the booklet under Section III "Your Settlement Costs", it states: "When shopping for settlement services, you can use this section as a guide, noting on it the possible services required by various lenders and the different fees quoted by service providers. **Settlement costs can increase the cost of your loan, so compare carefully.**" (Emphasis supplied)

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and which may well reside within federal jurisdiction. Many of amici's members do business in other states or even other countries; mortgage money and mortgage instruments freely move in interstate commerce. The Court of Appeals did not pause to consider whether its construction of the "unauthorized practice" statute abrogated rights protected or controlled by federal authority. See State Bar of Michigan v Cramer, 399 Mich 116, 134, 155-156 (1976). It gave no heed to make sure that "only the legitimate state interests are at stake". The Court's insistence that this be considered was ignored by the Court of Appeals.

The drastic impact of the decision below on Ameribank is graphically apparent. Among the members of amici organizations, there will be similar or greater impact depending upon the number of mortgages previously written. As for the future, the Court of Appeals has required either that the costs of document preparation be concealed and buried in other charges or that attorneys be hired to fill in the blanks on computer forms and their fees be shifted to the mortgagors for whose "benefit" the attorneys are said to be acting. Alternatively, mortgage companies may elect to discontinue making loans in this State because the inability to recover the cost of preparing the loan documents narrows the profit margin to an extent that it is no longer viable to do business in Michigan. (This is an industry in which the profit margin is determined in hundredths of 1%.) This decision may reduce the funds available in Michigan to enable residents of this State to acquire their own home. Aside from lining the pockets of plaintiffs and counsel in these class action cases, the ultimate burden of the decision will be borne by mortgagors and the general public. The depressing consequences on the commercial life of Michigan can hardly be overstated.

RELIEF

We respectfully urge this Court to reverse the Judgment of the Court of Appeals.

Respectfully Submitted,

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